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Attorneys for Plaintiff  
 POM WONDERFUL LLC

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

17 POM WONDERFUL LLC, a Delaware  
 limited liability company,  
 18  
 Plaintiff,  
 19  
 v.  
 20  
 21 THE COCA COLA COMPANY, a  
 Delaware corporation; and DOES 1-10,  
 22 inclusive,  
 Defendants.  
 23

Case No. CV-08-06237 SJO (JTLx)

**PLAINTIFF POM WONDERFUL  
 LLC'S NOTICE OF MOTION AND  
 MOTION FOR LEAVE TO FILE  
 [PROPOSED] FIRST AMENDED  
 COMPLAINT; DECLARATION OF  
 DANIEL S. SILVERMAN**

Hon. S. James Otero

Hearing:

Date: July 13, 2009

Time: 10:00 a.m.

Place: Courtroom 880

255 East Temple Street

Discovery cutoff: Dec. 9, 2009

Pretrial conference: March 1, 2010

Trial date: March 9, 2010

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 13, at 10:00 a.m. or as soon thereafter  
 3 as this matter may be heard, in Courtroom 880 of the United States District Court  
 4 for the Central District of California, 255 East Temple Street, Los Angeles,  
 5 California, before the Honorable S. James Otero, United States District Judge,  
 6 Plaintiff POM WONDERFUL LLC ("Pom Wonderful" or "Plaintiff") will move  
 7 and hereby does move for an order granting Plaintiff leave to file its [Proposed] First  
 8 Amended Complaint ("Proposed FAC") for false advertising against Defendant The  
 9 Coca Cola Company ("Coca Cola").

10 This motion is based on the grounds that the Proposed FAC merely adds an  
 11 express allegation that Pom Wonderful's claim for statutory unfair competition  
 12 pursuant to Cal. Bus. & Prof. Code § 17200 is predicated in part upon Coca Cola's  
 13 violation of California's Sherman Food, Drug, and Cosmetic Law, Health & Safe.  
 14 Code § 109875 *et seq.* (the Sherman Law). The Proposed FAC adds no new causes  
 15 of action, and makes relatively few changes to the original Complaint. Coca Cola  
 16 filed its Answer to the original Complaint on March 2, 2009, and the action is still in  
 17 an early stage. In fact, discovery has just begun, with the parties just recently  
 18 responding to first sets of written discovery. Trial is almost a year away, the  
 19 discovery cut-off is in December, and there is no prejudice that the amendment  
 20 would impose. As such, leave to amend, which is traditionally liberally granted,  
 21 should be granted here.

22 This motion is supported by this notice of motion and motion, the attached  
 23 memorandum of points and authorities, the [Proposed] First Amended Complaint  
 24 lodged herewith, the attached Declaration of Daniel S. Silverman, such additional  
 25 evidence and argument as may be presented at the hearing on this motion, all of the  
 26 pleadings, files and records in this proceeding, and such other evidence as may later  
 27 be submitted. The motion is made following the conference of counsel pursuant to  
 28

1 L.R. 7-3, which took place on June 17, 2009. See Declaration of Daniel S.  
2 Silverman, ¶¶ 2-3.

3  
4 Dated: June 22, 2009

ROLL INTERNATIONAL CORPORATION  
LEGAL DEPARTMENT

5  
6 By:   
7 Daniel S. Silverman  
8 Attorneys for Plaintiff  
9 POM WONDERFUL LLC  
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## I.

**INTRODUCTION**

Plaintiff POM WONDERFUL LLC (“Pom Wonderful” or “Plaintiff”) respectfully requests that the Court grant Pom Wonderful leave to file its [Proposed] First Amended Complaint (the “Proposed FAC”), which is lodged herewith pursuant to L.R. 15-1. The Proposed FAC adds allegations specifying that Pom Wonderful’s claim for statutory unfair competition pursuant to Cal. Bus. & Prof. Code § 17200 is predicated, in part, upon Defendant The Coca Cola Company’s (“Coca Cola”) violation of California’s Sherman Food, Drug, and Cosmetic Law, Health & Safe. Code § 109875 *et seq.* (the Sherman Law). See Proposed FAC, ¶ 46; see also Exhibit A to the attached Declaration of Daniel S. Silverman (copy of Proposed FAC which shows its changes from original Complaint in redline). The Proposed FAC adds no new cause of action, and makes few changes to the original Complaint. Id. Pom Wonderful’s Proposed FAC is timely, and does not prejudice Coca Cola. It should, therefore, be permitted pursuant to the liberal policy for amending pleadings.

## II.

**STATEMENT OF FACTS**

Pom Wonderful filed its original Complaint in this action on September 22, 2008. Coca Cola filed its Answer on March 2, 2009, following the Court’s ruling on its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

On June 17, 2009, Daniel Silverman, counsel for Pom Wonderful, met and conferred with Martin Bern, counsel for Coca Cola, regarding this motion. See Silverman Declaration, ¶ 4. Prior to the meet and confer, Pom Wonderful provided a copy of the Proposed FAC to Coca Cola’s counsel for review. Id., ¶ 3. During the meet and confer, however, Coca Cola’s counsel stated that it would not stipulate to the filing of the Proposed FAC, and instead would review this motion before deciding whether to oppose it. Id., ¶ 4.

1 **III.**

2 **ARGUMENT**

3 **A. Leave Should Be Granted To Amend the Complaint.**

4 **1. Leave To Amend Is Freely Granted.**

5 Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading  
6 “shall be freely given when justice so requires.” The Ninth Circuit has repeatedly  
7 reaffirmed that leave to amend is to be granted with “extreme liberality.” DCD  
8 Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987); see also United  
9 States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) (courts should be guided by  
10 policy favoring decisions on the merits “rather than on the pleadings or  
11 technicalities”); Cooper Development Co. v. Employers Insurance of Wausau, 765  
12 F. Supp. 1429, 1432 (N.D. Cal. 1991) (courts have been “quite liberal” in granting  
13 leave to amend); Moore, 3-15 Moore’s Federal Practice - Civil § 15.14 (“A liberal,  
14 pro-amendment ethos dominates the intent and judicial construction of Rule  
15 15(a).”). Where leave is sought early in the case, as here, courts routinely grant the  
16 proposed amendment of a complaint. See, e.g., McDonald v. Bond Collectors,  
17 L.L.C., 233 F.R.D. 576, 577 (S.D. Cal. 2005) (motion for leave granted where “[t]he  
18 case is in the very early pretrial proceedings.”).<sup>1</sup>

19 **2. Amendment Should Be Permitted Here.**

20 Pom Wonderful’s Proposed FAC is timely. This litigation remains in an early  
21 stage. Coca Cola filed its answer to the original complaint on March 2, 2009. Trial  
22 is set for March 9, 2010. The Court’s March 16, 2009 Scheduling Order did not set  
23 a cut-off date for filing motions to amend the pleadings. Accordingly, the Proposed  
24 FAC will not create undue delay.

25 The Proposed FAC does not add any new causes of action, and granting leave  
26 to amend would not prejudice Coca Cola, as written discovery has just begun, there

27 <sup>1</sup> Factors weighing against granting leave include bad faith, unfair prejudice to  
28 defendant, and prior amendments – none of which apply here. Id.



1 has been no document production yet, and no depositions have been taken. Further,  
2 the discovery cutoff is six months away.

3 The primary substantive difference between the current Complaint and the  
4 Proposed FAC is that the Proposed FAC expressly alleges, as a predicate act for  
5 Pom Wonderful's Section 17200 unfair competition claim, that Coca Cola has  
6 violated the Sherman Law, specifically Health & Safe. Code § 110660.<sup>2</sup> See  
7 Proposed FAC, ¶ 46. Section 110660 of the Sherman Law imposes obligations  
8 identical to 21 U.S.C. § 343(a) of the Federal Food, Drug and Cosmetic Act  
9 ("FFDCA"), providing that "[a]ny food is misbranded if its labeling is false or  
10 misleading in any particular."<sup>3</sup> These new allegations do not alter the basic nature  
11 of this lawsuit, because Pom Wonderful currently asserts a Section 17200 claim  
12 against Coca Cola for false and misleading advertising, pursuant to its original  
13 Complaint. See Complaint, ¶¶ 42-48. The Proposed FAC is simply more explicit  
14 about why Coca Cola's alleged conduct is unlawful under Section 17200,  
15 identifying its violation of a particular misbranding statute in the Sherman Law,  
16 Health & Safety Code § 110660.

17 In addition to the Sherman Law allegation, the Proposed FAC makes limited  
18 changes to the original Complaint's factual allegations. See Silverman Declaration,  
19 Exhibit A, at ¶¶ 16, 20, 24, 25 (Proposed FAC with tracked changes). Those  
20  
21

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22 <sup>2</sup> The Section 17200 claim pled by Pom Wonderful's original Complaint also  
23 encompasses Coca Cola's Sherman Law violation, but the [Proposed] FAC alleges  
24 that violation explicitly.

25 <sup>3</sup> Because it imposes obligations identical to those imposed by 21 U.S.C. §  
26 343(a), Section 110660 of the Sherman Law is not subject to the FFDCA's  
27 preemption provision, 21 U.S.C. § 343-1. See In re Farm Raised Salmon Cases, 42  
28 Cal. 4th 1077, 1094-95 (2008) (FFDCA does not preempt Section 17200 claim  
where predicate unlawful act consisted of Sherman Law violation; Sherman Law  
imposed legal obligations identical to FFDCA and its implementing regulations).

1 changes clarify and expand the original Complaint's factual allegations, rather than  
2 significantly changing the nature of the lawsuit. Id.

3 In sum, Pom Wonderful's Proposed FAC is submitted timely, contains the  
4 same causes of action as the original Complaint, and does not prejudice Coca Cola.  
5 Thus, Pom Wonderful's motion for leave should be granted.

6 IV.

7 CONCLUSION

8 For the reasons discussed above, Pom Wonderful respectfully seeks leave of  
9 this Court to file its Proposed FAC.

10 Dated: June 22, 2009

ROLL INTERNATIONAL CORPORATION  
LEGAL DEPARTMENT

11  
12  
13 By:

  
Daniel S. Silverman  
Attorneys for Plaintiff  
POM WONDERFUL LLC



**Declaration of Daniel S. Silverman**

I, Daniel S. Silverman, declare as follows:

1. I am an attorney in the litigation department of Roll International Corporation, counsel to Plaintiff Pom Wonderful LLC ("Plaintiff" or "Pom Wonderful") in the above-captioned matter. I am a member of the State Bar of California and admitted to practice law before the United States District Court for the Central District of California. I have personal knowledge of the matters set forth herein, and would competently testify thereto under oath if called as a witness. I submit this declaration in support of Plaintiff's Motion for Leave to File [Proposed] First Amended Complaint.

2. On June 5, 2009, I e-mailed Mr. Martin Bern, counsel for Defendant the Coca Cola Company ("Coca Cola"), and asked him whether Coca Cola would agree to stipulate to Pom Wonderful's filing of its [Proposed] First Amended Complaint ("Proposed FAC"), rather than requiring the filing of a motion for leave to amend. In an e-mail response, Mr. Bern asked for a copy of the Proposed FAC which showed its changes from the original Complaint in redline.

3. On June 15, 2009, during an in-person meet and confer regarding the parties' various discovery issues which was held at my offices, I handed Mr. Bern a copy of the Proposed FAC, showing its changes in redline, pursuant to his request.

4. On June 17, 2009, I telephonically met and conferred with Mr. Bern regarding Pom Wonderful's request that Coca Cola stipulate to the filing of the Proposed FAC. During the meet and confer, Mr. Bern stated that Coca Cola would not stipulate to the filing of the Proposed FAC, and instead would review Pom Wonderful's motion for leave to amend before deciding whether to oppose it.



1           5. Attached to this declaration as Exhibit A is a true and correct copy of  
2 the [Proposed] FAC which tracks in redline its changes from the Plaintiff's original  
3 Complaint in this action.

4  
5           I declare under penalty of perjury under the laws of the United States of  
6 America that the foregoing is true and correct. Executed this 22nd day of June,  
7 2009 in Los Angeles, California.


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11 Daniel S. Silverman  
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EXHIBIT "A"



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Attorneys for Plaintiff  
POM WONDERFUL LLC

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

POM WONDERFUL LLC, a Delaware  
limited liability company,

Plaintiff,

v.

THE COCA COLA COMPANY, a  
Delaware corporation; and DOES 1-10,  
inclusive,

Defendants.

Case No. CV-08-06237 SJO (JTLx)

**FIRST AMENDED COMPLAINT  
FOR FALSE ADVERTISING  
UNDER LANHAM ACT § 43(A);  
FALSE ADVERTISING UNDER  
CALIFORNIA BUSINESS &  
PROFESSIONS CODE § 17500, ET  
SEQ.; UNFAIR COMPETITION  
UNDER CALIFORNIA BUSINESS  
& PROFESSIONS CODE § 17500,  
ET SEQ.**

**DEMAND FOR JURY TRIAL**

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aclare@loeb.com¶  
MARK D. CAMPBELL (SBN 180528) .  
mcampbell@loeb.com¶  
DAVID GROSSMAN (SBN 211326) .  
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10100 Santa Monica Boulevard, Suite 2200 .  
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FIRST AMENDED COMPLAINT  
FOR FALSE ADVERTISING

030806-3

1 Plaintiff POM WONDERFUL LLC ("Pom Wonderful" or "Plaintiff") hereby  
2 alleges as follows:

3 **PARTIES**

4 1. Plaintiff Pom Wonderful is a Delaware limited liability company with  
5 its principal place of business in Los Angeles, California.

6 2. On information and belief, defendant The Coca Cola Company ("Coca  
7 Cola") is a Delaware corporation with its principal place of business in Atlanta,  
8 Georgia.

9 3. Plaintiff is not aware of the true names and capacities of the defendants  
10 identified herein as Does 1 through 10, inclusive, and therefore fictitiously names  
11 said defendants. Plaintiff will amend this Complaint to allege the true names and  
12 capacities of these fictitiously named defendants when their identities are  
13 ascertained.

14 4. Plaintiff is informed and believes, and thereon alleges, that Coca Cola  
15 and each of the fictitiously named Doe defendants (collectively "Defendants") were  
16 in some manner responsible for the acts alleged herein and the harm, losses and  
17 damages suffered by Plaintiff as alleged hereinafter. Plaintiff is also informed and  
18 believes that, while participating in such acts, each Defendant was the agent, alter  
19 ego, conspirator, and aidor and abettor of the other Defendants and was acting in the  
20 course and scope of such agency and/or acted with the permission, consent,  
21 authorization or ratification of the other Defendants.

22 5. As described further below, Coca Cola conducts business and  
23 manufactures and/or distributes products in the greater Los Angeles area, and  
24 throughout the United States.

25 **JURISDICTION AND VENUE**

26 6. This action arises under 15 U.S.C. § 1125(a) and the statutory law of  
27 the State of California. This Court has subject matter jurisdiction over this action  
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1 pursuant to 28 U.S.C. §1331 (federal question), 15 U.S.C. § 1121 (Lanham Act  
2 claims) and 28 U.S.C. §1367 (supplemental jurisdiction).

3 7. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and  
4 1400 because a substantial part of the events or omissions giving rise to the claims  
5 occurred in this District.

6 **FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS**

7 8. This action seeks redress for Coca Cola's deliberate and unlawful false  
8 and misleading representations regarding its Minute Maid Enhanced Pomegranate  
9 Blueberry product ("Pomegranate Blueberry Product"), which has been packaged,  
10 marketed and sold by Coca Cola based on the representation that the primary  
11 ingredients in the product are pomegranate and blueberry juice, when, in fact, the  
12 primary ingredients are actually apple and grape juice.

13 9. This action also seeks redress for the unfair, unlawful and fraudulent  
14 business practices of all Defendants, each of whom have participated in making the  
15 false advertising claims relating to Coca Cola's Pomegranate Blueberry Product in  
16 California and nationwide.

17 **I. POM WONDERFUL**

18 10. Plaintiff is the largest grower and distributor of pomegranates and  
19 pomegranate juice in the United States.

20 11. Plaintiff produces, markets and sells POM WONDERFUL® brand  
21 bottled pomegranate juice, and various pomegranate juice blends including a  
22 pomegranate blueberry blend. Pom Wonderful has been bottling, selling and  
23 marketing its juice products since 2002.

24 12. When Pom Wonderful began the development and distribution of POM  
25 WONDERFUL® juice, it invested millions of dollars in researching the nutritional  
26 qualities and health benefits of pomegranate juice, an investment that continues to  
27 this day. Pom Wonderful has consulted with world-renowned scientists, including a  
28 Nobel laureate, and underwrites major research studies, many of which are

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1 published in well-known and prestigious peer-reviewed scientific and medical  
2 journals.

3 13. Scientists have discovered that pomegranate juice has very high levels  
4 of unique polyphenols, antioxidants that are particularly effective at neutralizing  
5 free radicals, preventing oxidation of LDL cholesterol (the "bad" cholesterol) and  
6 plaque build-up in the blood vessels, and preserving nitric oxide, a key chemical in  
7 the body for regulating blood flow and maintaining vessel health.

8 14. A key element of Pom Wonderful's marketing campaign has been its  
9 concentration on the health benefits associated with pomegranates and pomegranate  
10 juice, and its emphasis on the high level of antioxidants contained in POM  
11 WONDERFUL® brand juice.

12 15. Through its investment of millions of dollars to research and promote  
13 the nutritional qualities and health benefits associated with pomegranate juice,  
14 Plaintiff largely created the burgeoning market for genuine pomegranate juice that  
15 exists today. POM Wonderful's pomegranate juice has, in only six short years,  
16 eclipsed all other products in its market segment of super premium juices to take the  
17 #1 spot nationwide in supermarket sales, as well as the #1 spots in the key  
18 geographic regions of Los Angeles, Chicago, New York, among many others. POM  
19 Wonderful's annual supermarket sales have, incredibly, gone from zero to well over  
20 \$70 million in that same period.

21 16. Due to POM's marketing efforts and funding of research, and  
22 substantial research not funded by POM, many consumers now associate  
23 pomegranate juice with certain nutritional qualities and health benefits.  
24 Unscrupulous competitors have set out to cash in on Plaintiff's success by marketing  
25 and selling to consumers products labeled as "pomegranate juice," that in fact  
26 contain little or no actual pomegranate juice. Coca Cola is one such competitor.

27 **II. COCA COLA AND ITS FALSE ADVERTISING OF ITS**  
28 **POMEGRANATE BLUEBERRY PRODUCT**

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17. Coca Cola markets and sells various bottled juice products under such brands as, among others, Odwalla and Minute Maid, and is currently one of Plaintiff's primary competitors in the bottled pomegranate juice market. Coca Cola is based in Atlanta, Georgia and, Plaintiff is informed and believes, markets, distributes and sells its products, including its Pomegranate Blueberry Product, in Los Angeles County and throughout the United States.

18. In September 2007, Coca Cola announced the addition of a new "Minute Maid® Pomegranate Blueberry" product to its line of "Minute Maid Enhanced Juices" targeting "the health-conscious shopper."



19. Like the pomegranate, in recent years the blueberry has become a staple for health conscious consumers because of its high antioxidant capacity. Thus, Coca Cola's Pomegranate Blueberry Product purports to combine two of nature's most powerful antioxidants into a single "Enhanced Juice" product. In fact, the main ingredients in Coca Cola's Pomegranate Blueberry Product are neither pomegranate nor blueberry juice, but rather, apple and grape juice.

20. Notwithstanding that Coca Cola's product actually contains little pomegranate or blueberry juice, Coca Cola decided to create a label with many misleading elements not required by federal or state regulation. For example, instead of calling its product "Apple Grape" juice, which are the two primary juices

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1 in its product, Coca Cola made a marketing decision to give this product the brand  
 2 name of "Pomegranate Blueberry" juice on the front label, and to juxtapose this  
 3 brand name with a picture of a pomegranate and other fruits, among other  
 4 misleading elements. Attached as "Exhibit A" are true and correct copies of  
 5 photographs of Coca Cola's Pomegranate Blueberry Product.

6 21. In addition to the claims on the product itself, Coca Cola also maintains  
 7 a website at <minutemaids.com> that prominently advertises and markets Coca  
 8 Cola's product as "Minute Maid Enhanced Pomegranate Blueberry" juice. Attached  
 9 as "Exhibit B" is a true and correct copy of Coca Cola's website advertising its  
 10 Pomegranate Blueberry Product.

11 22. Coca Cola has also advertised its Pomegranate Blueberry Product in  
 12 commercial spots aired during highly rated television shows such as American Idol.  
 13 Plaintiff is informed and believes that Coca Cola has engaged in other forms of  
 14 marketing and advertising of its Pomegranate Blueberry Product targeting  
 15 consumers throughout the United States.

16 23. Purchasers of Coca Cola's product are likely to be misled and deceived  
 17 by Coca Cola's product labeling, marketing and advertising. By name alone, one  
 18 would expect that the primary ingredients in Coca Cola's Pomegranate Blueberry  
 19 Product are pomegranate and blueberry juice. However, pomegranate juice ranks  
 20 third, by volume, behind apple and grape juice in Coca Cola's Pomegranate  
 21 Blueberry Product. Blueberry juice is found in even smaller amounts, ranking fifth  
 22 among the ingredients found in Coca Cola's product.

23 24. Coca Cola's false and misleading advertising of its Pomegranate  
 24 Blueberry Product is damaging to the reputation and goodwill of Plaintiff and is  
 25 damaging to the consuming public. These false and misleading representations are  
 26 designed to entice consumers to purchase Coca Cola's product over Plaintiff's  
 27 products. Specifically, Coca Cola's false and misleading representations regarding  
 28 the primary ingredients of its product deceive consumers, causing them to believe

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"Pomegranate Blueberry" juice.Formatted: Normal, Centered,  
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1 that its product, like Plaintiff's product, primarily contains pomegranate and  
 2 blueberry juice. The truth is that Coca Cola's product primarily contains apple juice  
 3 and grape juice, which are much less expensive juices than pomegranate juice and  
 4 blueberry juice.

5 25. Because the cost to produce Coca Cola's product is far less than the  
 6 cost to produce actual pomegranate blueberry juice (*i.e.*, a juice product whose  
 7 primary ingredients are actually pomegranate and blueberry juice), Coca Cola can  
 8 charge less for its product than competitors, including Plaintiff, while reaping a  
 9 substantial profit. In this way, Coca Cola entices consumers who would otherwise  
 10 buy Plaintiff's product to buy its product instead. In doing so, Coca Cola  
 11 wrongfully misleads and deceives consumers, and tricks them into believing that  
 12 they are getting a similar product (*i.e.*, all natural pomegranate blueberry juice with  
 13 all of its associated health benefits) for a lower price, when in fact they are getting a  
 14 very different product primarily containing apple juice and grape juice.

15 26. The natural, probable and foreseeable result of Coca Cola's wrongful  
 16 conduct has been to cause confusion, deception and mistake in the pomegranate  
 17 blueberry juice market as a whole, to deprive Plaintiff of business and goodwill, and  
 18 to injure Plaintiff's relationships with existing and prospective customers.

19 27. Plaintiff is informed and believes that Coca Cola's wrongful conduct  
 20 has resulted in increased sales of Coca Cola's own Pomegranate Blueberry Product  
 21 while hindering the sales of Plaintiff's pomegranate juice products and damaging  
 22 Plaintiff's goodwill. Plaintiff has sustained and will sustain damages as a result of  
 23 Coca Cola's wrongful conduct.

#### 24 **FIRST CLAIM FOR RELIEF**

25 (False Advertising Under Lanham Act § 43(a), 15 U.S.C. 1125(a)

26 Against All Defendants)

27 28. Plaintiff incorporates by reference Paragraphs 1 through 27 above as  
 28 though fully set forth herein.

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1        29. Upon information and belief Defendants have made and distributed, in  
2 interstate commerce and in this District, advertisements that contain false or  
3 misleading statements of fact regarding their products. These advertisements  
4 contain actual misstatements and/or misleading statements and failures to disclose,  
5 including, among others, the statement that Defendants' product consists primarily  
6 of pomegranate and blueberry juice.

7        30. Upon information and belief, these false statements actually deceive, or  
8 have a tendency to deceive, a substantial segment of Plaintiff's customers and  
9 potential customers. This deception is material in that it is likely to influence the  
10 purchasing decisions of Plaintiff's customers.

11        31. Defendants' false and misleading advertising statements and omissions  
12 injure both consumers and Plaintiff.

13        32. Defendants' false and misleading advertising statements and omissions  
14 violate the Lanham Act § 43(a), 15 U.S.C. §1125(a).

15        33. Defendants have caused, and will continue to cause, immediate and  
16 irreparable injury to Plaintiff, including injury to its business, reputation, and  
17 goodwill, for which there is no adequate remedy at law. As such, Plaintiff is entitled  
18 to an injunction under 15 U.S.C. §1116 restraining Defendants, their agents,  
19 employees, representatives and all persons acting in concert with them from  
20 engaging in further acts of false advertising, and ordering removal of all  
21 Defendants' false advertisements.

22        34. Pursuant to 15 U.S.C. §1117, Plaintiff is entitled to recover from  
23 Defendants the damages sustained by Plaintiff as a result of Defendants' acts in  
24 violation of Lanham Act § 43(a). Plaintiff is at present unable to ascertain the full  
25 extent of the monetary damages it has suffered by reason of Defendants' acts.

26        35. Pursuant to 15 U.S.C. §1117, Plaintiff is further entitled to recover  
27 from Defendants the gains, profits and advantages that they have obtained as a result  
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1 of their acts. Plaintiff is at present unable to ascertain the full amount of the gains,  
 2 profits and advantages Defendants have obtained by reason of their acts.

3 36. Pursuant to 15 U.S.C. §1117, Plaintiff is further entitled to recover the  
 4 costs of this action. Moreover, Plaintiff is informed and believes, and on that basis  
 5 alleges, that Defendants' conduct was undertaken willfully and with the intention of  
 6 causing confusion, mistake or deception, making this an exceptional case entitling  
 7 Plaintiff to recover additional damages and reasonable attorneys' fees.

### 8 **SECOND CLAIM FOR RELIEF**

9 (False Advertising Under Cal. Bus. & Prof. Code § 17500

10 Against All Defendants)

11 37. Plaintiff incorporates by reference Paragraphs 1 through 36 above as  
 12 though fully set forth herein.

13 38. Defendants knew or in the exercise of reasonable care should have  
 14 known that their publicly disseminated statements and omissions relating to their  
 15 Pomegranate Blueberry Product were false or misleading. Defendants' false  
 16 advertising statements and omissions injure consumers and Plaintiff. Defendants'  
 17 false and misleading statements include, among others, that Defendants' product  
 18 consists primarily of pomegranate and blueberry juice.

19 39. By making such untrue or misleading statements, Defendants have  
 20 engaged in false advertising in violation of the statutory law of the state of  
 21 California, Cal. Bus. & Prof. Code §17500, *et seq.*

22 40. By reason of Defendants' conduct, Plaintiff has suffered injury in fact  
 23 and has lost money or property.

24 41. Defendants have caused, and will continue to cause, immediate and  
 25 irreparable injury to Plaintiff, including injury to its business, reputation, and  
 26 goodwill, for which there is no adequate remedy at law. Plaintiff is entitled to an  
 27 injunction restraining Defendants, their agents, employees, representatives and all  
 28 persons acting in concert with them from engaging in further such acts, and

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1 forbidding Defendants from advertising their Pomegranate Blueberry Product as  
 2 primarily containing pomegranate and blueberry juice, and from making other false  
 3 statements in connection with the product.

4 42. Plaintiff is further entitled to a restitutionary recovery from Defendants.

5 **THIRD CLAIM FOR RELIEF**

6 (Statutory Unfair Competition – Cal. Bus. & Prof. Code §17200, *et seq.*

7 Against All Defendants)

8 43. Plaintiff incorporates by reference Paragraphs 1 through 42 above as  
 9 though fully set forth herein.

10 44. Defendants have made, published, disseminated, and circulated false,  
 11 deceptive, and misleading statements, representations, and advertisements in  
 12 California misrepresenting the nature, quality, and characteristics of their  
 13 Pomegranate Blueberry Product with the intent of selling, distributing, and  
 14 increasing the consumption of, and interest in, their Pomegranate Blueberry Product.

15 45. Defendants' conduct as alleged herein constitutes unfair competition in  
 16 that such acts were and are unlawful, unfair, deceptive and/or fraudulent business  
 17 acts or practices in violation of California Business & Professions Code §17200, *et*  
 18 *seq.*

19 46. Defendants' conduct as alleged herein constitutes unlawful, unfair,  
 20 deceptive and/or fraudulent business acts or practices in violation of California  
 21 Business & Professions Code §17200, *et seq.* because such acts were and are  
 22 violations of California Health & Safety Code § 110660, which states: "Any food is  
 23 misbranded if its labeling is false or misleading in any particular." Defendants have  
 24 violated Section 110660 because the Pomegranate Blueberry Product's label  
 25 misleads consumers into believing that it contains primarily pomegranate and  
 26 blueberry juice.

27 47. As a direct and proximate result of Defendants' wrongful conduct,  
 28 Plaintiff has suffered injury in fact, which losses include damage to Plaintiff's good

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1 will with its existing, former and potential customers. Defendants' conduct has also  
2 caused damage to consumers.

3 48. These wrongful acts have proximately caused and will continue to  
4 cause Plaintiff substantial injury, including loss of customers, dilution of goodwill,  
5 confusion of existing and potential customers, and diminution of the value of  
6 Plaintiff's products. The harm these wrongful acts will cause to Plaintiff is both  
7 imminent and irreparable, and the amount of damage sustained by Plaintiff will be  
8 difficult to ascertain if these acts continue. Plaintiff has no adequate remedy at law.

9 49. Plaintiff is entitled to an injunction restraining Defendants, their  
10 officers, agents, employees, and all persons acting in concert with them from  
11 engaging in further such unlawful conduct.

12 50. Plaintiff is further entitled to a restitutionary recovery from Defendants.

### 13 PRAYER FOR RELIEF

14 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

15 1. For temporary, preliminary and permanent injunctive relief prohibiting  
16 Defendants, their agents, or anyone working for, in concert with or on behalf of  
17 Defendants from engaging in false or misleading advertising with respect to the their  
18 Pomegranate Blueberry Product and/or violating Lanham Act § 43(a), which relief  
19 includes but is not limited to removal of all false or misleading advertisements and  
20 corrective advertising to remedy the effects of Defendants' false advertising.

21 2. For an order requiring Defendants to correct any erroneous impression  
22 persons may have derived concerning the nature, characteristics, or qualities of their  
23 Pomegranate Blueberry Products, including without limitation, the placement of  
24 corrective advertising and providing written notice to the public.

25 3. That Defendants be adjudged to have violated 15 U.S.C. §1125(a) by  
26 unfairly competing against Plaintiff by using false, deceptive or misleading  
27 statements of fact that misrepresent the nature, quality and characteristics of their  
28 Pomegranate Blueberry Products.

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1 4. That Defendants be adjudged to have unlawfully and unfairly competed  
2 against Plaintiff under the laws of the State of California, Cal. Bus. & Prof. Code  
3 §17200, *et seq.*

4 5. That Defendants be adjudged to have unfairly competed against  
5 Plaintiff by engaging in false or misleading advertising under the laws of the State  
6 of California, Cal. Bus. & Prof. Code §17500, *et seq.*

7 6. That Plaintiff be awarded damages Plaintiff has sustained in  
8 consequence of Defendants' conduct.

9 7. That Plaintiff be awarded Defendants' profits obtained by Defendant as  
10 a consequence of Defendants' conduct.

11 8. That such damages and profits be trebled and awarded to Plaintiff as a  
12 result of Defendants' willful, intentional and deliberate acts in Plaintiff violation of  
13 Lanham Act § 43(a).

14 9. That Plaintiff recover its costs and reasonable attorneys' fees.

15 10. That all of Defendants' misleading and deceptive materials and  
16 products be destroyed as allowed under 15 U.S.C. §1118.

17 11. That Plaintiffs be granted prejudgment and post judgment interest.

18 12. That Plaintiff have such other and further relief as the Court deems just  
19 and proper.

20 Dated: June \_\_, 2009,

21 ROLL INTERNATIONAL CORPORATION  
LEGAL DEPARTMENT,

22 By:

23 Daniel S. Silverman  
24 Attorneys for Plaintiff  
25 POM WONDERFUL LLC

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**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury on all issues properly triable by jury.

Dated: June, 2009,

ROLL INTERNATIONAL CORPORATION  
LEGAL DEPARTMENT,

By:

Daniel S. Silverman  
Attorneys for Plaintiff  
POM WONDERFUL LLC

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